posed withdrawal of this particular prayer. The court refused the application to withdraw and an order was made allowing the parties to sell their shares by private treaty.

This order was therefore made against the wishes of one of Mr. Ariarajah's two clients. Who this person was can now be seen from the appeal lodged by Mr. Ariarajah. She is Meenachi, the wife of the other client of his. But there apparently was no conflict of interests, since this other client has now by another firm of solicitors lodged his own appeal. There are now two appeals, each making the other appellant a respondent, and two sets of appeal records, identical in all respects, even in respect of the grounds of appeal, though not in expression.

The order now appealed from obviously varied the consent order. The appeal was therefore grounded almost entirely on the jurisdiction of the court to vary an order which it had made and which had been drawn up and perfected. The question is whether in the circumstances the jurisdiction exercised by the court can be justified.

The answer to the question is obvious and, with respect, is so clearly stated in paragraph 2011 of Volume 2 of either the 1976 or the 1979 Supreme Court Practice that we will merely content ourselves with repeating that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as an estoppel: *Kinch* v. *Walcott.*[1] All the more so, in our view, since there is not the slightest question of any mistake as to facts or law. A co-proprietorship of agricultural land which is under cultivation is at best an uneasy proposition and when the conditions pertaining are such that production must suffer, the time has come for the parting of the ways. This could be achieved by one of several ways. One of the co-proprietors could buy out the others, or the land could be partitioned, or the land could be sold either by private treaty or by public auction. This is not unknown to the parties: see the letter dated June 6, 1970 from the then solicitors of the applicant to the other co-proprietors. It was in this understanding of the situation facing them and the alternatives open to them that all the co-proprietors consented to a sale by public auction.

Yet in these circumstances and despite the fact that at the hearing his counsel had not voiced any objection on his behalf, Ganapathy Chettiar lodged an appeal from the order made. We could not understand how he could now object and on the facts pertaining to his case, we would have dismissed his appeal on no other consideration.

Meenachi's appeal was at least consistent with her objection at the hearing, if not with one of the prayers in her application. Since there had been no mistake on the part of anyone when the consent order for the sale by public auction was made, the only possible way in which this order could be altered would be by the consent of all the parties: *Australasian Automatic Weighing Machine Co.* v. *Walter.*[2] Her objection, if taken into consideration by the court, would effectively remove from the court any jurisdiction to make the order. But in making the application she gave that consent. Her husband at the hearing did not seek to withdraw that consent. The learned judge refused Meenachi's application made orally to withdraw the consent in terms of one of the prayers in her joint application and if the learned judge was right, there was therefore before him the consent of all the parties which would effectively give him the jurisdiction to alter the consent order.

When the appeals were argued before us, counsel for the respondents to the appeal advised us that their clients' shares in the land had now been sold and the transfers executed. As we understood the position, this sale was effected in anticipation of the consent of Meenachi and her husband Ganapathy Chettiar expressed in the second prayer of their application which was for leave to sell by private treaty. In view of this, we were of the opinion that the learned judge was right in holding that it was then too late for them to withdraw their prayer. We accordingly dismissed the appeals with costs.

Appeals dismissed.

Solicitors: *T. Ariarajah & Co.; M. Segaran & Co.; Skrine & Co.; Sethu, Ghazali & Gomez.*

TEO AH BIN v. TAN KHENG GUAN

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) March 8 & May 5, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 103 of 1980]

Practice and Procedure — Summary judgment — Service outside jurisdiction — Service by advertisement in newspapers — Application to set aside judgment — Application allowed by trial judge — Appeal — R.S.C. 1957, O. 14A, O. 27, r. 15, O. 28, r. 11.

In this case the appellant had filed a specially indorsed writ claiming specific performance of an agreement between him and the respondent. Leave was obtained to serve the writ outside jurisdiction and when it appeared that the writ could not be served on the respondent in Singapore, leave was obtained to publish a notice in newspapers in Singapore. When the respondent did not enter appearance, the appellant obtained leave to enter judgment under Order XIVA. Subsequently the respondent applied to have the judgment set aside.

The learned judge set aside the judgment on the grounds (1) that he was satisfied that the method of substituted service approved by him did not or was not likely to bring knowledge of the writ to the respondent and therefore the service was bad; (2) that the appellant had obtained an order for more than what he had prayed for. The appellant appealed.

Held: (1) the High Court has an inherent power to set aside its own order made under the present circumstances;

(2) the Appeal Court should not interfere with the exercise of a discretion by the High Court in this case in setting aside the judgment on the ground that the substituted service by advertisement was not such as to make the respondent aware of the proceedings as the view of the learned judge was supported by evidence as to the unsatisfactory nature of the mode of substituted service he had had allowed;

(3) having decided that the respondent had a defence on the merits, the learned judge was right in setting aside the order on substituted service and the judgment.

Cases referred to:-

(1) *Eu Hoong Chwee* v. *Chua Say Tiong* [1968] 2 M.L.J. 12.

(2) *Dsane* v. *Hagan* [1961] 3 W.L.R. 776.
(3) *Aw Chen* v. *J. Koplan* [1969] 2 M.L.J. 190, 192.
(4) *Kwong Kum Sun Chan Glass Merchant* v. *Ahong Construction Co. (Malaya) Ltd.* [1968] 1 M.L.J. 29.
(5) *S.A. Andavan* v. *Registrar of Titles, Negri Sembilan & Ors.* [1977] 2 M.L.J. 220, 225.
(6) *Boyce* v. *Gill* (1891) 64 L.T. 824.
(7) *Ling Nam Rubber Works* v. *Leong Bee & Co. (No. 2)* [1968] 1 M.L.J. 265.

FEDERAL COURT CIVIL APPEAL.

C.A. Dass (*Subranaicker* with him) for the appellant.

R.R. Chelliah for the respondent.

Abdul Hamid F.J. (delivering the judgment of the Court): The appellant, who was the plaintiff in the court below, had filed a specially endorsed writ claiming specific performance of an agreement between him and the respondent (defendant in the court below), and other ancillary reliefs.

Having obtained leave to serve the writ outside jurisdiction the appellant was unable to have the notice of writ served on respondent, the reason given by the Process Server of the High Court in Singapore being that the latter had moved out of his last known residential and postal address.

By an order of court dated June 30, 1975 the appellant obtained leave to publish a Notice of Commencement in the Singapore edition of the *Straits Times* and in the *Sin Chew Jit Poh*. This was duly done and when respondent failed to enter an appearance within the prescribed time, the appellant prayed for and was granted leave to enter judgment under Order 14A of the R.S.C. in terms of the prayers set out in his summons-in-chambers on July 18, 1978.

The respondent then applied by summons-in-chambers to have the Order 14A order abovementioned set aside, for leave to file his defence within 2 weeks and for an order that the Registrar of Titles, Johore be directed to enter a Registrar's caveat to prevent dealings in his 4/10 undivided share in the 10 lots of land.

The learned judge set aside his earlier order on two main grounds. After having heard submissions, he concluded that the method of substituted service he had earlier approved, particularly the publication in the *Sin Chew Jit Poh* did not or was not even likely to bring knowledge of the writ to the respondent, and that therefore the service was bad since the very purpose of its issue had not been satisfied.

On the other ground i.e. that appellant had obtained an order which was more than what he had prayed for in his writ of summons by this we suppose is meant prayer (3) in the summons i.e. "an order that from the purchase price payable to the defendant herein, a sum of $231,883.91 be deducted and the balance of $168,166.09 be paid into court."

His Lordship therefore held that the order, for this reason, was not an irregularity but a nullity. He therefore set aside the order.

Mr. Dass for the appellant says that an Order 14A decision cannot be set aside, the only remedy being an appeal. Though Order 81 rule 7 of the 1980 Rules allows such setting aside (since June 1, 1980), all material steps in this appeal took place before that date. The order setting aside was made on April 16, 1980. Therefore he argued the 1957 Rules apply and there was no provision under these rules for the court to set aside its own decision made under Order 14A.

This judgment made under Order 14A according to Mr. Dass is not a judgment by default. To support his contention he cited the case of *Eu Hoong Chwee* v. *Chua Say Tiong*[1] where it was held that a judgment obtained under Order 14 is not a judgment in default and cannot therefore be set aside under Order 27 rule 15. At page 13 Raja Azlan Shah J. (as he then was) said:

"I now come to the other ground of setting aside the judgment entered on February 2, 1967, vide Order 27 rule 15. I have nothing further to add to what I have stated above except to say that the law on setting aside a judgment granted in default is well settled and I do not propose to deal with it at length. The question before me is whether the judgment obtained can be set aside under Order 27 rule 15. That is answered in *Spira* v. *Spira* [1939] 3 All E.R. 924 where it was held that a judgment obtained under Order 14 is not a judgment obtained in default and Order 27 rule 15, which is *in pari materia* with ours, had no application."

In *Dsane* v. *Hagan*[2] it was held, *inter alia*, that in Order 27 rule 15 "judgment by default" meant a judgment obtained by a plaintiff in reliance on some default on the part of the defendant in respect of something which he was directed to do by the rules, and that as a defendant's default in entering an appearance was not a circumstance on which a plaintiff could rely for obtaining a judgment under Order 14A, such judgment would not be a "judgment by default" notwithstanding default of appearance by the defendant. The plaintiff accordingly would not be entitled to have the judgment in the specific performance action set aside under Order 27 rule 15.

In reply to this ground, Mr. Chelliah for the respondent points out that the facts here are different from those in the cases already cited, and that the feeling in England that *Dsane's* case had been wrongly decided led to an amendment in procedure. The present order Order 86 rule 8 reads:

"Any judgment given against a defendant who does not appear at the hearing of an application under rule 1 may be set aside or varied by the court on such terms as it thinks just."

Order 86 replaces the revoked Order XIVA. The editorial note says that rule 8 which corresponds with Order 14 rule 11 appears to have been inserted for the purpose of negativing the decision of *Dsane* v. *Hagan* that a judgment under the former Order 14A against a defendant in default of appearance was not a judgment by default which could be set aside under the former Order 27 rule 15.

Therefore even if the 1957 Rules apply, then by virtue of Order 1 rule 2, the English practice may be resorted to and this would allow the judge to set aside the order.

With respect we are inclined to agree with Mr. Chelliah that the courts have an inherent power to

set aside its own order made under the present circumstances.

Another ground on which the judgment was attacked is that even if the judge had the powers to set aside a judgment by default, he was wrong in holding that the manner and mode of the substituted service was inadequate and therefore bad in law.

We were referred to a passage in the 1957 Annual Practice at page 91 under the heading "Service by Advertisement" which says:

"This method of service is sometimes necessary, especially in Queen's Bench actions, e.g. where the defendant's residence is not known, and in cases where there is reason to believe that he is keeping out of the way to evade service, and it is not possible to name any person, service on whom in substitution would probably be effective in reaching the defendant. In practice, an order for service by advertisement will not be made save in an exceptional case where there is good reason to believe that the advertisement will be seen by the defendant."

The onus in the court below is on the defendant/respondent to show that the order for substituted service was wrongly obtained and executed (see *Aw Chen* v. *J. Koplan*[3]), and it was urged upon us that this onus had not been discharged.

That the court below had the power to set aside the order for substituted service does not seem to be in dispute.

Thus in *Kwong Kum Sun Chan Glass Merchant* v. *Ahong Construction Co. (Malaya) Ltd.*,[4] in an application by the defendant company to set aside the judgment against it in default of appearance, the question arose for determination whether the service of the writ upon the defendant was good service.

A copy of the writ pertaining to this action was served on the defendant by leaving a copy of the writ at the registered office of the defendant in accordance with R.S.C., 1957, Order 9 rule 8(1)(a). Actually previous to the date of such service the defendant had completely vacated and removed to another address and carried on its business at its new address. A notice of the change of address was posted on the main door of the old office notifying the defendant's new address.

Under section 120(1) of the Companies Act, the defendant was required to notify the Registrar of Companies of the change of address within a period of one month but the service of the writ in this case took place within this period of one month.

It was held that as the service effected in this case did not give any notice at all to the defendant the purported service was, therefore, not a good service and the judgment in default of appearance and all subsequent proceedings against the defending must be set aside with liberty on the part of the plaintiffs to reserve the writ on the defendants.

In *S.A. Andavan* v. *Registrar of Titles, Negri Sembilan & Ors.*[5] Ajaib Singh J., following the decision in *Boyce* v. *Gill*[6] went further and held that if a court during the hearing of any cause or matter notices any serious procedural irregularities in the obtaining of a judgment which in some way adversely affects the rights of any of the parties before it the court may even set it aside on its own motion.

It will be helpful to consider in this respect a passage from *Mallal's* Supreme Court Practice Vol. 1 at page 76 which reads:

"Substituted Service — 'The intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings.' *Per* Romer L.J., in *Deverall* v. *Grant Advertising* [1955] Ch. 111; [1954] 3 All E.R. 389; [1954] 3 W.L.R. 688, C.A. following the principle laid down in *Porter* v. *Freudenberg, infra.* So even when an order for substituted service has been made the judgment can be set aside when merits are disclosed and when the court is satisfied that the defendant was not aware of the proceedings and was not avoiding service which is tantamount to knowledge of the proceedings. *Sockalingam Chettiar & Ors.* v. *Somasundram Chettiar* [1941] M.L.J. 103."

We would therefore say that his grounds of judgment show that the learned judge had come to the view that the substituted service by an advertisement was not such as to make the respondent/defendant aware of the proceedings. It had never been suggested anywhere that the respondent was attempting to avoid service. Therefore we do not think it will be right for us to interfere into the exercise of a discretion which appears to us to be supported by evidence as to the unsatisfactory nature of the mode of substituted service he had previously allowed.

Very much in the nature of an afterthought Mr. Dass referred us to the case of *Ling Nam Rubber Works* v. *Leong Bee & Co. (No. 2)*[7] as authority for the proposition that the inherent authority to set aside its own judgment exists only until its order is made and perfected, and since the order has been made and perfected here, it cannot do so any longer. However the authority cited concerns clerical errors and accidental omission covered by Order 28 rule 11 and not a default judgment under Order XIVA, and with respect does not apply.

We agree with Mr. Chelliah that the other part of the applicant's submission on whether the applicant had indeed obtained more than what he had prayed for in his statement of claim is only incidental. Indeed in the court below Mr. Subranaicker for the applicant had conceded that the applicant had obtained an order which is more than what he had prayed for in his statement of claim. We believe that is prayer (3) in the summons-in-chambers of December 29, 1977.

Having decided that the respondent has a defence on the merits we think that the learned judge was right in setting aside the order on substituted service and the judgment.

We would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Subranaicker & Co.; R.R. Chelliah Bros.*